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MICHAEL RODAK, JR., C

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1972

No. 72-920

SAMUEL ZORN,

Petitioner,

v.

PEOPLE OF THE STATE OF NEW YORK,

Respondent.

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# PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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## TABLE OF CONTENTS

*Page*

The Question Involved ..... 2

Statement of the Case ..... 3

Reason for Granting the Writ ..... 7

Conclusion ..... 14

Appendix A – Order and Opinion of Appellate Division First Department ..... A-1

Appendix B – Order of Court of Appeals Dated September 28, 1972 ..... B-1

Appendix C – Opinion of Breitel, J. ..... C-1

Appendix D – Order Dated March 23, 1970 ..... D-1

Appendix E – Constitutional Amendments ..... E-1

### Cases Cited

Berger v. N.Y., 388 U.S. 41 (1967) 87 S.Ct. 1873, 18 L.Ed. 2d 1040 ..... 8

Gelbard v. U.S., 408 U.S. 41, 92 S.Ct. 2357, 33 L.Ed. 2d 179 (1972) ..... 13

Katz v. U.S., 389 U.S. 47 (1967) 88 S.Ct. 507, 19 L.Ed. 2d 573 ..... 8

People v. Zorn, 31 N.Y. 2d 134 and otherwise reported 335 N.Y.S. 2d 257, – N.E. 2d. – ..... 2

U.S. v. Eastman, 326 F.S. 1038, 1039, affirmed in 465 F. 2d 1057 (Cir-3d, 1972) ..... 8

IN THE
SUPREME COURT OF THE UNITED STATES

SAMUEL ZORN,

Petitioner,

v.

PEOPLE OF THE STATE OF NEW YORK,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK:**

Petitioner Samuel Zorn, prays that a writ of Certiorari to review a final judgment and order of the Court of Appeals of the State of New York entered July 7, 1972, (appendix "A" infra) which affirmed an order of the Supreme Court of the State of New York Appellate Division, held in and for the First Judicial Department thereof, made and entered, March 14, 1972, affirming a judgment of conviction of the petitioner under Section 225.15(1) of the Penal Law, (possession of gambling records in the second degree, a misdemeanor).

The said judgment affirmed by the said Appellate Division was entered in the Supreme Court of the State of New York, New York County, March 23, 1971.

Thereafter, in accordance with the practice of the State of New York, the petitioner duly moved the Court of Appeals of the State of New York for an order permitting a re-argument of the said appeal thereto, as aforesaid, for a further order

amending the remittitur to show that the Constitutional issues of the United States Constitution (Fourth and Fourteenth Amendments thereof) were raised, argued and considered by the said Court of Appeals. That motion was denied by an order made and entered by the said Court of Appeals of the State of New York, entered and dated September 28, 1972, (appendix "B" infra).

The opinion of the said Court of Appeals of the State of New York is reprinted herein, as Appendix "C" infra, and is officially reported in *People v. Zorn*, 31 N.Y. 2d 134 and otherwise reported 335 N.Y.S. 2d 257, – N.E.2d.–

The order of the Court of Appeals of the State of New York is dated and was entered July 7, 1972. The order denying the motion in the said Court of Appeals for re-argument on the said appeal and an order to amend the remititure, was dated and entered September 28, 1972.

The jurisdiction of this Court is invoked and conferred under 28 U.S.C. 1257(3) and Rule 22(1) of the Rules of the Supreme Court of the United States.

## THE QUESTION INVOLVED

Whether a wire-tap warrant which names but one subject and where the State authorities wire-tap under such warrant, and overhear a conversation between the main subject and an unknown person, may the State authorities seize that conversation and use it to procure a search warrant for premises occupied by the undesignated person, and ultimately seize evidence to be used to prosecute and convict such undesignated person:

## STATEMENT OF THE CASE

### PROCURING THE WIRE-TAP WARRANT:

On March 23, 1970, Judge John M. Murtagh, a Judge of the Supreme Court, New York County, granted an order authorizing the authorities to intercept and record telephone calls over the telephone numbers as follows:

TE 2-8645 and 754-9502 (31, 32).*

The warrant or order, is set forth in Appendix D, (infra). This order was founded on an affidavit by the District Attorney of New York County, verified March 23, 1970, and the supporting affidavit by an Assistant District Attorney named Gerard J. Hinckley, verified March 23, 1970 (39-55). The affidavit of Gerard J. Hinckley alleged that the authorities were investigating a person known as Nat Brown, who also used aliases, and who was suspected of promoting gambling and conspiracy (42). Brown was known as Nellis Slayka and Natale LoCicero, and had a record with the police department commencing 1946 (42).

On February 19, 1970, Mark Ross, a stock-broker testified before a New York Grand Jury after being subpoenaed. He admitted in his Grand Jury testimony that he placed bets with Brown; on "rare occasions" the bets exceeded $500. He also bet $10,000 weekly (42, 43). Ross' Grand Jury testimony is found on pages 37-38 of the record on appeal.

Ross' testimony disclosed that he telephoned Brown at a number designated as SP 7-8901 (37).

*This refers to the pagination of the Record on Appeal, filed in the Court below.

The affidavit of Mr. Hinckley then recited the results o police surveillance of Brown. Thus, it was asserted that th police saw Brown on September 29, 1969 at P.J. Clark restaurant speaking to Charles Stein and a person name Forlano. These men, the latter two, had records with the polic department relating to gambling (44). The conversation ove heard related to betting (44). Brown was also observed to hav given money to Stein (44).

On February 17, 1970, Brown was in his home at 116 First Avenue, apartment 42D until 11:30 a.m. when he wa observed leaving the apartment and going to a store at 114 First Avenue, where he bought a newspaper and returned hom (45).

Later that day, Brown left the apartment in the compan of Herbert Beller. They went to a telephone booth located a the southeast corner of 64th Street and First Avenue. Brow made a telephone call over the telephone number 754-950 (44-45). Beller was known to the police because he had criminal record (45).

On February 18, 1970, Brown left his apartment and wer to the store at 1140 First Avenue and after leaving the stor walked on First Avenue where he met an unknown man an went to the doorway, he was removing his hand from his pocke (45). Brown subsequently re-entered his apartment (45-46).

On February 19, 1970, the police made similar observa tions of Brown leaving his apartment. That day, howeve Brown went to Sherry's restaurant at 46th Street and Vande bilt Avenue where he was observed reading a racing form. Th bartender also gave money to Brown "surreptitiously" (46).

Five days later on February 24, 1970, Brown was at the Southeast corner of 64th Street and First Avenue for 20 minutes and spoke to an unknown man (47). The evening of that day, Brown was at Gallagher's restaurant in the company of persons who had criminal records (47). From that restaurant they went to a restaurant known as Bruce Hoe's Restaurant and from there they went to a restaurant called "My House" (47-48).

On March 2, 1970, at 1:20 p.m. Brown was observed at the telephone booth located at 64th Street and First Avenue. He was overheard telling Beller who was with him "I have to make three calls". Brown spoke over the telephone for 15 minutes (48).

On March 3, 1970, at 12:45 p.m. Brown was again observed at the public telephone at 64th and First Avenue (48). Later that day Brown said to Beller, at Sherry's Restaurant, "I got nine for Cuzzy". This was characterized by the police expert as referring to Brown owing money to "Cuzzy Morgan" (49). After this, Brown went to a phone in the Roosevelt Hotel where he said he would be home that evening and that if the person at the other end had "more numbers" to call him at home and if the other person had the numbers before hand to call him at Gallagher's (49). This was characterized by the police as referring to the "business of the day". (49)

On March 9, 1970, at 1:30 p.m. Brown and Beller went to the phone booth at First Avenue and 64th Street. The police overheard Brown say over the phone "Ruby just called me. He says he got hit pretty good on the Knick game last night'...after a pause he further stated, "no the office". This was characterized by the police as referring to gambling losses (49-50). Later

that day, the police overheard Brown refer to monetary amounts in wagering over a telephone at the Roosevelt Hotel (50).

The District Attorney who executed that affidavit then concluded that Brown used the telephone having the number TE 2-8645 at his home, and the telephone having the number 754-9502 which was the public telephone located at the southeast corner of 61st Street and First Avenue (50, 51).

**THE PROCURING OF THE SEARCH WARRANT:**

The authorities thereafter procured a search warrant on April 21, 1970 (68). This was based on an affidavit of the Assistant District Attorney Gerard J. Hinckley (69-74).

The search warrant authorized a search of apartment 2-7J at premises 418 West 117th Street, New York County and of any person who had control of the property subject to seizure under the warrant (67, 68).

The affidavit submitted to procure the search warrant referred to the wire-tap order and the use of it by the Authorities (69-70). It was alleged that on March 31, 1970, Brown called telephone number 243-0538 and spoke to an unknown male. Brown allegedly said "N.B. for Perry"...I laid you a dollar forty-five for a nickel on Baltimore and I had U.C.L.A. for four dollars, that's it.... I owe you three and a quarter on the ticket". The affidavit further alleges that they discussed ball games to be played that evening (70, 71).

It was next alleged that on April 21, 1970, Brown was arrested for gambling (71). Upon arrest, Brown was searched

and the police retrieved a book containing the numbers 243-8350 (71). The police were of the opinion that since that number was the reverse of telephone number 243-0538, this was a practice used by gamblers to conceal the true telephone number (72).

The District Attorney concluded that the place where the telephone was located was used for gambling and that the evidence could easily be destroyed (72, 73).

Prior to trial, the appellant moved to suppress the wire-tap order and the search warrant because the appellant was not named in the wire-tap order and the conversation seized was evidence underlying the granting of the search warrant. That the premises mentioned in the search warrant, was based on the use of the wire-tap order and if that order was void, the search warrant would be void and hence the police trespassed in the premises (77-80, 94).

## REASON FOR GRANTING THE WRIT

The wire-tapping warrant herein never named the petitioner. Furthermore, the wire-tap warrant was used by the authorities in an overbroad manner as will be hereinafter shown.

The warrant allowed intercepting of telephone calls of Brown over two separate instruments, one having number TE 2-8645 and the other 754-9502 (31, 32).

The eavesdropping warrant was limited to

> "...that there are reasonable grounds to believe that evidence of the crime of Promoting Gambling as a Felony

and Conspiracy to Promote Gambling may be obtained by intercepting and recording certain telephone communications of Nellis Slayka, also known as Nat Brown, also known as Natale LoCicero, transmitted over the telephone line and instruments bearing the numbers TE 2-8645 listed to Nellis Slayka, 1164 First Avenue, Apartment 2D, New York County and 754-9502 a public telephone..." (32)

Furthermore, the said warrant expressly permitted eavesdropping for a period of thirty days it being provided that the auditioning should not "automatically terminate when such evidence has first been obtained...." (32, 33).

The statutes both Federal and State authorizing wire-tapping has as their purpose minimum intrusion and allow only a narrow use. The statutes seek to adhere to the limited permissiveness expressed in *Berger v. New York*, 388 U.S. 41 (1967) 87 S.Ct. 1873, 18 L.Ed. 2d 1040; and *Katz v. U.S.*, 389 U.S. 47 (1967) 88 S.Ct. 507, 19 L.Ed. 2d 573.

Berger set forth the limits governing the constitutional standards governing wire-tapping, these delinations were and are particularity as to the crime, the type of conversation, limitation of the authorities to search unauthorized areas, and a direction to cease once the objective is obtained, as well as the requirement that the police must make a return as to what was seized.

The statute in question, must be narrowly construed, because of the secret and all-pervasiveness of wiretapping as well as all other electronic surveillance; see *U.S. v. Eastman*, 326 F.S. 1038, 1039, affirmed in 465 F. 2d 1057, (Cir-3d, 1972). It is submitted to allow the authorities for a thirty day period, day and night and at anytime thereof to audition a named subject

and to seize communications of an unknown caller or an unknown person called by the subject without any judicial sanction, is to frustrate the constitutional requirement of minimal intervention; see *Katz v. U.S.*, 389 U.S. 347, where this court held that the Federal agents confined the auditioning to brief periods when the subject used the telephone booth in question and that the authorities took great care to overhear only the conversations of the petitioner himself.

The privacy involved here dealt with the reliance of all persons who used telephones and relied on the privacy of this type of communication. Somewhere between the exercise of the order in this question and the seizure of the conversations relating to the petitioner, there should have been judicial supervision as to the retention of the tapped speech. This issue should not be left to the authorities.

Furthermore, there is no probable cause that Brown used any telephone at night. The following is a summary when Brown used the phone as shown in the affidavit submitted in support of the application for the wire-tap order; these times were:

12:20 P.M., 1:20 P.M., 12:45 P.M., 2:05 P.M., and 1:30 P.M. (45, 48-49).

There was a complete failure to show that the police ever observed Brown to have used his telephone located in his house. It was claimed that the police overheard Brown talking over a telephone to an unknown man on March 3, 1970 and saying that he would be home that evening and that if the unknown persons had "those numbers" to call him at home, but if not, to call him at the restaurant (48, 49). Firstly, this conversation did

not necessarily refer to gambling. Since speech is involved, the police officer's opinion is meaningless. This one-sided conversation could have referred to any innocent transaction. In various instances items of inventory or other innocent things are called "numbers". In addition, the parties were cloaked with the presumption of innocence.

In regard to the public phone, it would seem that the wire-tap order was completely void because if the telephone was a public phone and was subject to the electronic auditioning for a period of thirty days, day and night, this is not the limited surveillance envisaged by *Katz v. U.S.*, 389 U.S. 347.

At the hearing on the application to suppress the evidence in this case, counsel argued that the statutes in question did not mandate that a Judge himself audition the tapes, to ascertain whether the conversations sought were auditioned or whether other conversations not sought were auditioned and accordingly make a determination. The District Attorney at that time stated

> "...they were submitted to the Court, they were under the supervision of the Court. The Judge has a right to listen to the tapes that he desires. He has a right to listen, to have reports submitted to him, if he desires. The People, as far as the People's application of the statute, we have complied with the statute, we have submitted to the Court's jurisdiction, we have complied with Court's order as to placing the tapes and sealing the tapes." (29)

Thus, the position of the prosecution was that the Court had to option to listen or not listen to the tapes. That the prosecution complied with the Court's direction by sealing and preserving the tapes (104, 105).

The State Statute in effect at the time of the beginning of

this case was Section 825(4) of the former Code of Criminal Procedure of the State of New York, *supra.* See also section 2517(5) of Title 18 U.S.C. *supra.*

No application was made in this case for any further wire-tap order or warrant ratifying the seizure of the conversation attributed to the Petitioner who was unnamed in the wire-tap warrant.

The New York State Court of Appeals clearly held that this was not necessary, interpretating the State statute as relating merely to a communication not otherwise sought. In other words, the statute in question and the warrant were construed as limited to conversations relating to the crime in question and not to other crimes not described in the said warrant.

If this is the construction, it is submitted, that the section is violative of the Fourth Amendment to the Federal Constitution.

Such holding, in effect, means that anybody who speaks over the telephone, even though unknown to the authorities, does so at his peril and is subject to police auditioning because conversation is construed by the authorities as being embraced by the order.

However, this is not limiting the use of the telephone but allowing the telephone to be the nucleus for a widespread investigation of everybody who uses the telephone. All this in the absence of any subsequent court order or warrant. Under this procedure, it is the police who would interpret and construe the conversation of the unnamed person, as being

within the embrace of the State statute. Thus, the unnamed person could very well talk to the subject of the wire-tap warrant over the telephone and while the language used would be innocous, nothing would prevent the authorities maintaining the surveillance, from construing the harmless language as having a secondary meaning which would thereby allow them to "seize" the conversation. The construction of the State statute, is unconstitutional and violates the fundamental right of privacy.

The communication "not otherwise sought" was the conversation attributed to the petitioner. Conversations are not isolated but are the practical form of a person's thoughts. To hold that the unnamed person talks to named suspects about the particular subject matter, such conversation or participation in the joint conversation may also be seized would subject the general public to indiscriminate surveillance with no duty for the authorities to account to any Judge, who can determine whether the unnamed person can be so subject. A wire-tap warrant so used would not be in the narrow and particularized manner described by the Fourth Amendment, especially in regard to speech. Since it is not known generally who the named subject will call, or who will call the subject, or what the conversations will relate to, or how the government auditioner will interpret the conversation, the order so used is actually a writ of assistance.

It is contradictory to rule that a conversation of a person not named in the wire-tap warrant cannot be used even though seized if it does not relate to the subject matter in issue, unless there is a timely amendment to the original order, but not to require the original order be amended so as to include the name of the unknown party who converses with the named subject

about the designated subject matter. It would seem inconsistant to isolate speech in a particular from the person who utters the speech.

As was stated in *Katz v. U.S.*, 389 U.S. 347, the Fourth protects people not things or as in this case, "telephones".

The very least that could have been done here, was that the authorities having ascertained that an unknown person was talking to the subject, was to have applied for another warrant whereby a Judge could determine whether such conversation by and with the unknown person (in this case the petitioner) was of the type within the wire-tap warrant.

See *U.S. v. Whitaker,* 343 F.S. 358, 363, 364, 366, 367 U.S.D.C. E.Pa.

It is submitted, that where an issue arises in regard to wire-tapping, as to whether the authorities should or should not procure a warrant, that issue is resolved in favor of procuring judicial approval; see *U.S. v. United States District Court for Eastern District of Michigan,* 407 U.S. 297, 29 S.Ct. 2125, 32 L.Ed. 2d 752 (1972).

It is further put to this Court that notwithstanding any statutory scheme seeking to reconcile the Fourth Amendment requirements of privacy, and wire-tapping, in actual practice, wire-tapping cannot be done in any manner compatible with the right of privacy; see the concurring opinion of Mr. Justice Douglas in *Gelbard v. U.S.*, 408 U.S. 41, 92 S.Ct. 2357, 33 L.Ed. 2d 179 (1972).

## CONCLUSION

**IT IS RESPECTFULLY SUBMITTED THAT THIS PETITION FOR A WRIT OF CERTIORARI BE GRANTED:**

Respectfully submitted,

ARNOLD E. WALLACH
Attorney for Petitioner

## 'APPENDIX A

### Order and Opinion of Appellate Division First Department

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on March 14, 1972

Present—Hon. Harold A. Stevens, Presiding Justice,
Emilio Nunez,
Theodore R. Kupferman,
James B. M. McNally,
Louis J. Capozzoli, Justices.

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The People of the State of New York,
Respondent,

-against-

Samuel Zorn,
Defendant-Appellant.

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An appeal having been taken to this Court by the defendant-appellant from the judgment of the Supreme Court, New York County (Lane, J.), rendered on March 23, 1971, convicting defendant, upon his plea of guilty, of possession of gambling records in the second degree, and said appeal having been argued by Mr. Arnold E. Wallach of counsel for the appellant, and by Mr. Robert A. Goldschlag of counsel for the respondent; and due deliberation having been had thereon, and

upon the Opinion of this Court filed herein,

It is ordered that the judgment so appealed from be and the same is hereby affirmed. [Stevens, P.J., and Capozzoli, J., dissent in an Opinion by Capozzoli, J.]

ENTER:

HYMAN W. GAMSO

Clerk.

Stevens, P.J., Nunez, Kupferman, McNally, Capozzoli, JJ.

4861

The People of the State of New York,
Respondent, R.A. Goldschlag

-against-

Samuel Zorn,
Defendant-Appellant. A.E. Wallach

Judgment, Supreme Court, New York County (Lane, J.), rendered on March 23, 1971, affirmed.

Opinion by McNally, J. All concur, except Stevens, P.J., and Capozzoli, J., who dissent in an Opinion by Capozzoli, J.

Order filed.

SUPREME COURT, APPELLATE DIVISION
First Department, February 1972

Harold A. Stevens, P.J.,
Emilio Nunez,
Theodore R. Kupferman,
James B.M. McNally,
Louis J. Capozzoli, JJ.

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The People of the State of New York,

Respondent,

-against-

Samuel Zorn,

Defendant-Appellant.

---

Appeal by the defendant from a judgment of the Supreme Court, New York County (Myles J. Lane, J.), rendered March 23, 1971, convicting him, upon his plea of guilty, of possession of gambling records in the second degree and sentencing him to a nine-month term of imprisonment.

Robert A. Goldschlag of counsel (Michael R. Juviler and Barry M. Fallick; Frank S. Hogan, District Attorney) for respondent.

Arnold E. Wallach of counsel (Peter J. Peluso, attorney) for defendant-appellant.

McNALLY, J.

Defendant-appellant appeals from a judgment of conviction entered on his plea of guilty of Possession of Gambling Records in the Second Degree. The plea followed the denial of defendant's motion to suppress evidence obtained by the interception of telephonic communications and the search of certain premises. The eavesdropping warrant dated March 23, 1970 authorized the interception of telephonic communications of Nellis Slayka, also known as Nat Brown, and Natale LoCicero pertaining to the crimes of Promoting Gambling as a Felony and Conspiring to Promote Gambling over the telephone line numbers TE 2-8645 and 754-9502. The authorized telephonic interception revealed information that the place assigned telephone number 243-0538, to wit, 418 West 17th Street, N.Y., apartment 2-7J, contained gambling records. Thereon a search warrant dated April 21, 1970 issued for the search of said apartment for the seizure of records of an unlawful gambling business. The search warrant was executed April 22, 1970. During the search of the apartment, defendant opened its door with a key and was arrested.

The eavesdropping warrant was validly issued on probable cause, and observes the Federal and New York constitutional requirements. *Berger v. New York*, 388 U.S. 41; § 816, Code of Criminal Procedure; Article 700 Criminal Procedure Law. Thereby it was proper to intercept any conversation with Slayka over the specified telephone lines relating to the specified gambling crimes. So long as any such telephone conversation with Slayka related to the said crimes, it was subject to interception regardless of the identity of the other person and the fact that he was not identified by name in the warrant. *People v. D'Amico*, 37 AD 2d 730 (2nd Dept.) and

*People v. Gnozzo*, 64 Misc. 2d 599, *aff'd*, 37 AD 2d 922 (4th Dept.), to the extent they require the eavesdropping warrant to name the person or persons with whom the person named in the warrant is to have the conversation pertaining to gambling crimes, imports a requirement not mandated by the Fourth Amendment to the United States Constitution and Section 12 of Article I of the Constitution of New York. The probable cause which sustains the warrant as to Slayka also supports it with respect to all persons with whom he conversed over the described telephone lines on the subject of gambling crimes.

Defendant's reliance on subd. 4 of § 825, Code of Criminal Procedure (now CPL § 700.65, subd. 4) is misplaced. Thereby a communication "not otherwise sought" may be used as evidence prior to amendment of the warrant. Here precisely what was sought under the warrant was the conversation sought to be suppressed. It may well be, although we do not now decide, a violation of § 825 would have occurred if the telephone conversation intercepted did not related to gambling crimes.

If we did not sustain the eavesdropping warrant, we would direct a hearing on defendant's standing to challenge it because he does not admit the telephone conversation allegedly implicating him.

The judgment should be affirmed.

All concur except Stevens, P.J. and Capozzoli, J. who dissent in a dissenting opinion by Capozzoli, J.

*Re: No. 4861 – People v. Samuel Zorn,*

CAPOZZOLI, J. (DISSENTING):

In this case the question which is raised is whether the search warrant, which was executed by the People as the result of information obtained while listening to the conversations over the telephone for which they had an authorized wiretap order against one, Slayka, can be sustained where the information concerning the activites of Zorn, the defendant herein, was obtained during the course of a monitored conversation between him and Slayka. It appears, on the authority of People v. D'Amico, 37 App. Div. 2d 730 and People v. Gnozzo, 64 Misc. 2d 599, aff'd 37 App. Div. 2d 922, that whatever Zorn may have been overheard to say could not be used in a subsequent application for a search warrant because he was not mentioned in the original wiretap order which was directed only as against Slayka. As a matter of fact C.C.P. 825(4), (now C.P.L. 700.65(4)), provides that an application could have been made by the People to amend the original wiretap order to include whatever Zorn was saying. This the People failed to do.

Accordingly, the evidence should be suppressed and the judgment reversed.

Stevens, P.J. concurs.

## APPENDIX B
## ORDER OF COURT OF APPEALS
## DATED SEPTEMBER 28, 1972

STATE OF NEW YORK
IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Twenty-eighth day of September A.D. 1972.

PRESENT, Hon. Stanley H. Fuld, Chief Judge, presiding.

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Mo. No. 733

The People &c.,

Respondent,

vs.

Samuel Zorn,

Appellant.

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A motion for reargument and to amend the remittitur in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is in each respect denied.

A copy

s/ Gearm Kimball
Deputy Clerk

[Seal]

## APPENDIX C

The People of the State of New York, Appellant,
v. Joseph Gnozzo, Respondent.

The People of the State of New York, Respondent, v.
Samuel Zorn, Appellant.

Argued May 31, 1972; decided July 6, 1972.

31 NEW YORK REPORTS, 2d SERIES

Opinion per Breitel, J.

A D 2d 922; *People v. Szymanski*, 62 Misc. 2d 1065; *People v. D'Amico*, 37 A D 2d 730; *Berger v. New York*, 388 U.S. 41; *United States v. Escandar*, 319 F. Supp. 295; *United States v. Sklaroff*, 323 F. Supp. 296, 427 F. 2d 1140; *United States v. LaGorga*, 336 F. Supp. 190; *United States v. King*, 335 F. Supp. 523; *United States v. White*, 401 U.S. 745; *People v. Sullivan*, 29 N Y 2d 69.) III. The information disclosed by the investigation justified the issuance of an eavesdropping warrant, effective day and night for 30 days. (*United States v. Becker*, 334 F. Supp. 546; *People v. Fiorillo*, 63 Misc. 2d 480; *United States v. Sklaroff*, 323 F. Supp. 296; *People v. Varney*, 32 A.D. 2d 181.) IV. The eavesdropping warrant implicitly authorized the police to determine the identities of the individuals to whom Brown spoke by the use of a mechanical device. (*People v. Fino*, 24 N.Y. 2d 1020.)

BREITEL, J. These two cases test the use of telephone conversations intercepted under an eavesdropping warrant to establish probable cause for a subsequent search warrant against

the outside party to the conversation, not named in the eavesdropping warrant. Appellant Zorn and respondent Gnozzo contend that the conversations may not be used against persons not named in the eavesdropping warrant, and especially so where the warrant was never amended to include them. Related issues raised in the *Zorn* appeal are whether the eavesdropping warrant was supported by probable cause and whether its 30-day term and absence of limitation as to hours for execution was too broad.

In the *Zorn* case, the hearing court in New York County denied defendant's motion to suppress evidence obtained from the eavesdropping and subsequent search warrants. After defendant's plea of guilty to possession of gambling records (Penal Law, § 225.15), a misdemeanor, the court sentenced him to nine months' imprisonment. The Appellate Division, First Department, affirmed by a divided vote.

In the *Gnozzo* case, the hearing court in Erie County granted defendant's motion to suppress evidence. The Appellate Division, Fourth Department, unanimously affirmed.

The order of the Appellate Division in *Zorn* should be affirmed, and that in *Gnozzo* reversed. Neither the Constitution nor the former Code of Criminal Procedure and current Criminal Procedure Law prohibit the use of validly intercepted conversations against an outside party to the conversation, not named in the warrant.*

In *Zorn*, an eavesdropping warrant was issued for two

telephones, the home telephone of one Slayka and a public telephone at a street intersection. Interception was limited to "communications" of Slayka "pertaining to the crimes of Promoting Gambling as a Felony and Conspiracy to Promote Gambling".

In the application for the eavesdropping warrant the prosecutor averred that one Ross, a stockbroker, had testified to placing bets with Slayka, alias Brown, up to $10,000 a week. Slayka had prior convictions for gambling. He had been overheard in person on at least two occasions discussing bets with others having similar convictions, and money had changed hands. Slayka was seen using the public telephone booth at the street intersection on four occasions in February and March, 1970. On the last occasion an officer standing outside the booth overheard Slayka saying "we got hit pretty good on that Knick game last night." The testimony of large bets having been placed, the association with known gamblers, the bits of conversations, and the telephone calls allegedly established commercial gambling activity.

The prosecutor's affidavit was dated March 23, 1970, and the warrant made effective March 25, 1970. On March 31, Slayka was overheard placing a call on the public telephone to a telephone in Zorn's apartment. Slayka stated over the telephone, "I laid you a dollar forty-five for a nickel on Baltimore and I had UCLA for four dollars, that's it...I owe you 3¼ on the ticket." The outside person replied, "OK, I'll tell him." The next day another call to the same number included conversations about betting on sports events.

On April 21, 1970 a warrant was issued on the basis of the intercepted conversations to search an apartment at an address

obtained from the telephone company, and where the telephone to which Slayka had made calls was located. Pursuant to the search warrant the police entered the apartment the next day, and found papers indicating that the apartment was used as a wire room for large-scale gambling. Zorn came to the apartment while the police were there, opened the door with a key, and was arrested.

Defendant Zorn contends that the eavesdropping warrant was issued without probable cause, and that the 30-day period without limitation as to execution day or night was unconstitutionally broad.

Issuance of an eavesdropping warrant requires, of course, probable cause (*People v. Kaiser*, 21 N.Y. 2d 86, 96, affd. *sub nom. Kaiser v. New York*, 394 U.S. 280; *Berger v. New York*, 388 U.S. 41, 55). In *People v. Feinlowitz* (29 N.Y. 2d 176) the court held affidavits, less incriminating than those here, adequate. The court stated: "[T]here obviously was probable cause for the seizure by reason of the extensive observation of defendant's suspicious activities. Defendant, a known and convicted gambler, was seen to frequently use a public telephone booth, despite having access to a private telephone at his office. Upon one occasion, a police officer personally heard defendant discussing sports lines on baseball games and quoting odds on the day's games to someone with whom he was in contact on that telephone." (*id.*, at p. 182). In this case the named inside person, Slayka, was a known and convicted gambler. He had been under observation from September, 1969 to March, 1970, when the eavesdropping warrant was issued. He had been seen conversing with other known gamblers, and on at least two occasions had been overheard talking about losses, relaying bets, and obtaining "lines" on future sporting events.

He had been observed in the public telephone booth in question on four occasions, and on the last he was overheard mentioning losses on a professional basketball game. Taken together, the facts establish probable cause.

The eavesdropping warrant in *Zorn* authorized interception for a 30-day period without restriction as to day or night. It expressly denied authority, however, to listen to conversations privileged or unrelated to the stated crime.

After the former New York statute permitting eavesdropping warrants for renewable two-month periods was declared unconstitutional in the *Berger* case (388 U.S. 41, *supra*), the maximum period for interception was reduced to 30 days with renewals only upon a further showing of probable cause (Code Crim. Pro., § 819, subd. 7, § 821; CPL 700.30, 700.40). The constitutionality of the 30-day period has not been previously tested in New York, but the same period provided by the Federal statute has been repeatedly upheld by the lower Federal courts (U.S. Code, tit. 18, § 2518, subds. [5], [6]; *United States v. Leta*, 332 F. Supp. 1357, 1360-1361; *United States v. Sklaroff*, 323 F. Supp. 296, 306-307, app. Dsmd 427 F. 2d 1140; cf. *United States v. King*, 335 F. Supp. 523, 530, 537). For this type of interception a 30-day period, given the extent and nature of the activity under surveillance, is not excessive.

Defendants contend that the eavesdropping warrant should have been limited to daylight hours, but such a restriction is not required. As stated in *United States v. Becker* (334 F.Supp. 546): "It is a matter of common knowledge that the activities of [a gambling] enterprise – the receiving and dispensing of information and wagers in regard to various types of sporting

events, such as horse racing, boxing, baseball, hockey, football, which take place at either coast of the continent and points in between and at different hours of the day and night – are not limited to such specific hours that an interception order can, as a practical matter, define precisely and limit the period during which interception can be conducted." (*id.*, at p. 549). Moreover, there is no complaint about the time when the interception was actually made. Any error, if there were error, was technical and should be overlooked (cf. *People v. Glen*, 30 N.Y. 2d 252, 261-262; *People v. Varney*, 32 A.D. 2d 181).

In the *Gnozzo* case, there is no dispute about the validity of the eavesdropping warrant. The warrant was issued for a 20-day period, and was limited to conversations of one Lombardo over two specified telephone numbers related to the placing or "laying-off" of bets. Pursuant to the warrant a conversation between Lombardo and defendant Gnozzo was intercepted relating to gambling. Primarily on the basis of evidence and leads obtained from this conversation, a search warrant was issued for Gnozzo's premises. Evidence uncovered during the search led to Gnozzo's arrest. Gnozzo's motion to suppress evidence, in a decision at odds with that in the *Zorn* case, was granted.

Both Zorn and Gnozzo contend that under the statutory scheme the conversations overheard, though involving the suspect named in the eavesdropping warrant and the criminal activity specified, may not be used against the outside parties. They concede, however, that the conversations could have been used against the inside parties.

The eavesdropping warrants complied with the statutes. The Code of Criminal Procedure (§ 817, subd. 2, par. [b]) then

provided to the same effect as the CPL (700.20, subd. 2, par. [b]) which provides that an application for an eavesdropping warrant must contain "(iii) a particular description of the type of the communications sought to be intercepted, and (iv) the identity of the person, *if known*, committing such designated offense and whose communications are to be intercepted". (Emphasis supplied.) The provisions governing the form of the warrant are comparable (CPL 700.30, subds. 2, 4; Code Crim. Pro., § 819, subds. 2, 4). A "communication" is defined to include "conversation and discussion" (CPL 700.05, subd. 3; Code Crim. Pro., § 814, subd. 3). The communications in each case were adequately described and the known suspects were identified. The statute required identification only of those known, thus excluding those who identity is unknown.

The contents of a communication intercepted pursuant to a valid warrant may be disclosed "in any criminal proceeding in any court or in any grand jury proceeding" (CPL 700.65, subd. 3; Code Crim. Pro., § 825, subd. 3). There is no requirement the communication be used only against named suspects.

Service of written notice within 90 days after termination of the eavesdropping warrant is required "upon the person named in the warrant and such other parties to the intercepted communication as the justice may determine in his discretion is in the interest of justice" (CPL 700.50, subd. 3; Code Crim. Pro., § 822, subd. 3). It was apparently obvious to the Legislature that statements of outside parties to the communications would necessarily be intercepted. It may be inferred from the notice requirement to "other parties" that the State contemplated use of these statements in criminal proceedings.

Zorn, however, contends, though apparently Gnozzo does

not, that the warrant must have been amended to include his name before the conversation could be used against him.

The provision relied upon requires an amendment for a communication intercepted "which was not otherwise sought", thus: "When a law enforcement officer, while engaged in intercepting communications in the manner authorized by this article, intercepts a communication which was not otherwise sought and which constitutes evidence of any crime that has been, is being or is about to be committed, the contents of such communications, and evidence derived therefrom, may be disclosed or used as provided in subdivisions one and two. Such contents and any evidence derived therefrom may be used under subdivision three when a justice amends the eavesdropping warrant to include such contents. The application for such amendment must be made by the applicant as soon as practicable. If the justice finds that such contents were otherwise intercepted in accordance with the provisions of this article, he may grant the application." (CPL 700.65, subd. 4; see, also, Code Crim. Pro., § 825, subd. 4). Where the communication intercepted involves the crime specified in the warrant, the named suspect, and an unknown outside party, at least in this instance, the communication is "sought" and no amendment is required. Zorn concedes that the communication was "sought" if used against the named suspect, Slayka. Whether an amendment is required depends on the disclosure of a different crime, and perhaps on other circumstances, but not against whom the communication is to be used. (Semble contra, *People v. Szymanski*, 62 Misc. 2d 1065, 1067; cf. *People v. D'Amico*, 37 A.D. 2d 730.)

The Commission on Revision of Penal Law and Criminal Code spelled out the intent of the provision for amendment in

its memorandum to the predecessor statute which also referred to communications "not otherwise sought": "Section 822 relates to a situation where, in the course of executing a valid eavesdropping warrant (which authorizes, of course, the overhearing of a particularly described conversation), the applicant or his designated agent unexpectedly overhears an incriminating conversation that is totally unrelated to the crime for which the warrant was issued. A line of authority upholds the seizure and use of evidence not specified in a search warrant but discovered in the course of executing such warrant. Similarly, a valid eavesdropping warrant should allow the use of unexpected conversations relating to a crime other than the one under investigation. Since the question is not altogether free from doubt, cogent reasons exist for dealing with it statutorily, as does § 822" (McKinney's 1968 Session Laws of New York, Memorandum, p. 2293, at p. 2296). Thus, the legislative intent was to require amendments where different crimes are disclosed (see, also *People v. Ruffino*, 62 Misc. 2d 653, 658).

Zorn and Gnozzo also contend that use of their conversations without their being named in the eavesdropping warrants violates the State and Federal Constitutions. It was on the basis of the Federal Constitution that the County Court in Erie County granted Gnozzo's motion to suppress (64 Misc. 2d 599).

Section 12 of article I of the Constitution of the State of New York provides:

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons

or things to be seized.

"The right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated, and ex parte orders or warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained, and identifying the particular means of communication, and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof."

The Fourth Amendment of the Federal Constitution is identical in language to the first paragraph above quoted.

It is basic to both constitutional provisions that only "unreasonable searches and seizures" and "unreasonable interception of telephone communications" are prohibited (*Katz v. United States*, 389 U.S. 347, 354; *Berger v. New York*, 388 U.S. 41, 53, *supra; United States v. Escandar*, 3 19 F. Supp. 295, 301). The defendants concede that eavesdropping was conducted in accordance with the terms of the warrants.

After prohibiting unreasonable searches and seizures, both constitutional provisions specify the conditions under which warrants may issue. The affidavit in support of the warrant must "identify the particular person or persons whose communications are to be intercepted." The warrants in these cases did what the Constitution requires by naming suspects. Indeed, the constitutional validity of the warrants as to the named suspects is not challenged.

Eavesdropping statutes are valid even if, of necessity, they entail interception of both ends of a telephone conversation.

The *Katz* and *Berger* cases (389 U.S. 347; 388 U.S. 41, *supra*) make it clear that eavesdropping warrants with proper limiting conditions may be valid. In *United States v. Escandar* (319 F. Supp. 295, *supra*) the court rejected the argument that no constitutionally valid eavesdropping statute may be drawn because both ends of a conversation are necessarily overheard. In doing so, the court cited the *Katz* and *Berger* cases (389 U.S. 347; 388 U.S. 41, *supra*).

The precise issue in the present cases has been raised in the Federal courts. They have consistently held the eavesdropping statutes and warrants valid, and the conversations usable against persons not named in the warrants. (*United States v. Cox*, 449 F.2d 679, 686-687; *United States v. Iannelli*, 339 F. Supp. 171, 177; *United States v. LaGorga*, 336 F. Supp. 190, 192-193; *United States v. King*, 335 F. Supp. 523, 531-532, 538-539, *supra*; *United States v. Perillo*, 333 F. Supp. 914, 921; *United States v. Sklaroff*, 323 F. Supp. 296, 325, *supra*; *United States v. Escandar*, 319 F. Supp. 295, *supra*.)

In no context have suppression rules been extended to exclude evidence, the seizure of which is authorized by a valid warrant. A valid eavesdropping order of necessity permits the interception of communications of at least two parties. Since seizure of the conversation was authorized, the evidence seized is admissible against the parties to the conversation. Admissibility does not determine the lawfulness of the seizure; the lawfulness of the seizure determines admissibility.

Accordingly, the order of the Appellate Division in the *Gnozzo* case should be reversed and the case remanded, and the order in the *Zorn* case should be affirmed.

Cheif Judge Fuld and Judges Burke, Scileppi, Bergan, Jasen and Gibson concur.

In *People v. Gnozzo:* Order reversed and case remitted to Erie County Court for further proceedings in accordance with the opinion herein.

In *People v. Zorn:* Order affirmed.

## APPENDIX D

### Order Dated March 23, 1970

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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In the Matter

of

Intercepting and Recording Telephonic Communications over the telephone assigned numbers TE2-8645 and 754-9502.

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It appearing from the affidavits of Frank S. Hogan, District Attorney of the County of New York and Gerard J. Hinckley, Assistant District Attorney of the County of New York said affidavits having been submitted in support of this eavesdropping warrant, that there are reasonable grounds to believe that evidence of the crime of Promoting Gambling as a Felony and Conspiracy to Promote Gambling may be obtained by intercepting and recording certain telephonic communications of Nellis Slayka, also known as Nat Brown, also known as Natale LoCicero transmitted over the telephone lines and instruments bearing the number TE2-8645 listed to Nellis Slayka, 1164 First Avenue, apartment 2D, New York County and number 754-9502, a public phone located on South East Corner of 64 Street and First Avenue, New York County, the Court being satisifed that the prosecution of these crimes could not be obtained by other means, it is

ORDERED, that pages 40 through 43 of the testimony of Martin Ross relating to his dealings with Nellis Slayka, also known as Nat Brown, also known as Natale LoCicero before the third February 1970 Grand Jury be disclosed to this Court as part of the attached affidavit in support of the application for Eavesdropping Warrant.

ORDERED, that the District Attorney of the County of New York, or any police officer of the City of New York acting under the direction and supervision of said District Attorney, is hereby authorized to intercept and record the telephonic communications of Nellis Slayka, also known as Nat Brown also known as Natale LoCicero pertaining to the crimes of Promoting Gambling as a Felony and Conspiracy to Promote Gambling, over the lines and instruments bearing the numbers TE2-8645 and 754-9502, and it is further

ORDERED, that nothing contained herein shall be construed as authorizing the District Attorney or his agents to intercept or overhear any conversation which appears privileged or unrelated to the aforementioned crime; and that the interception of said conversations shall be conducted in such a way as to minimize the interception of communications not otherwise subject to eavesdropping by this order, and it is further

ORDERED, that this Eavesdropping Warrant shall be executed as soon as practicable and be effective the 26th day of March 1970, and its authorization shall continue until evidence of the aforementioned crime shall be obtained, and said authorization shall not automatically terminate when such evidence has been first obtained, but in no event shall such authorization continue beyond thirty (30) days from its

effective date, to wit, the 25th day of April 1970.

Dated: New York, New York, this 23rd day of March, 1970.

Time: 9:40 AM

/S/ JOHN M. MURTAGH
Justice of the Supreme Court

## APPENDIX E

## CONSTITUTIONAL AMENDMENTS

### AMENDMENT IV
### SEARCHES AND SEIZURES

The right of the people to be secure in their persons, houses, papers, and effects, [against unreasonable searches and seizures], shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

* * * *

### AMENDMENT XIV

**CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT**

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

## STATUTES INVOLVED

### 47 UNITED STATES CODE, SECTION 605
### As Amended June 19, 1968, Pub.L. 90-351, Title III, § 803, 82 Stat. 223

**Subchapter VI—Miscellaneous Provisions**

**§ 605. Unauthorized publication or use of communications**

Except as authorized by chapter 119, Title 18, no person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, (1) to any person other than the addressee, his agent, or attorney, (2) to a person employed or authorized to forward such communication to its destination, (3) to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, (4) to the master of a ship under whom he is serving, (5) in response to a subpoena issued by a court of competent jurisdiction, or (6) on demand of other lawful authority. No person not being authorized by the sender shall intercept any radio communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person. No person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by radio and use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto. No person having received any intercepted radio communication or having become acquainted with the contents,

substance, purport, effect, or meaning of such communication (or any part thereof) knowing that such communication was intercepted, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of such communication (or any part thereof) or use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto. This section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication which is broadcast or transmitted by amateurs or others for the use of the general public, or which relates to ships in distress.

As amended June 19, 1968, Pub.L. 90-351, Title III, § 803, 82 Stat. 223.

## 18 UNITED STATES CODE, SECTION 2515

### Prohibition of Use As Evidence of Intercepted Wire or Oral Communications

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 216.

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## 18 UNITED STATES CODE, SECTION 2516(2)

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(2) The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable State statute an order authorizing, or approving the interception of wire or oral communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses.

Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 216.

## SECTION 225.15(1)
## PENAL LAW – STATE OF NEW YORK

A person is guilty of possession of gambling records in the second degree when, with knowledge of the contents or nature

section. Such contents and any evidence derived therefrom may be used under subdivision three of this section when a justice amends the eavesdropping warrant to include such contents. The application for such amendment shall be made by the applicant as soon as practicable. If the justice finds that such contents were otherwise intercepted in accordance with the provisions of this title, he may grant the application."